IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5757 OF 2006
IN
B.C.C.C. S.C. SUIT NO.4138 OF 1978

AND

WRIT PETITION NO.5793 OF 2006
IN
B.C.C.C. S.C. SUIT NO.4137 OF 1978

Bhagirathlal Shankarlal Somani
and Anr. ..Petitioners

Vs.

Rameshchandra Daulal Soni & Anr ..Respondents

Mr.Suresh Gole for the petitioners

Mr.P.S.Dani with Mr.V.R.Kasle for the respondent no.1 and 2

CORAM : A.P.DESHPANDE, J

DATED : 1ST DECEMBER, 2006

P.C.:

1. The present petitioner is defendant no.1 whereas respondent no.1 is original plaintiff no.1. The suit is based on title by treating petitioners /orig. defendant as trespassers and / or in unlawful possession of the 'galas'. As there are two 'galas' in occupation of the defendant, two

suits are filed wherein question involved are identical. It is the case of the plaintiff/respondent no.1 herein that he has purchased the gala and he is the one who has paid the consideration for the same, hence is the owner whereas the case of the present petitioners / defendant is that he has paid the amount of consideration for purchase of the galas but for the reason that the defendant had taken loan from the father of the plaintiff, the sale deed was executed in the name of the plaintiff and the said execution of sale is be-nami transaction.On these pleadings, the trial court had framed issues. When the suits were fixed for evidence, on an oral motion made by the plaintiff, the trial court proceeded to frame an additional issue casting the burden on the defendant no.1 and further directed the defendant to enter the witness box, as in the opinion of the trial court the case was squarely covered by Order 18 Rule 1 of the CPC.

2. The learned counsel for the petitioners submits that having regard to the various issues that are framed, the case falls under Order 18 Rule

3 of the C.P.C.and at the most what the plaintiff could have chosen is reserving evidence touching the issues in regard to which the burden is placed on the defendants. What is emphatically contended is that the petitioners are taken by surprise on account of an oral motion made and were denied an opportunity to file any reply to the request made by the plaintiffs counsel before the court at the spur of the moment and it is also submitted that issuing further direction, directing the defendant to enter the witness box, has caused prejudice.

3. In nut shell, the grievance is that without reasonable opportunity being granted to the petitioners, the impugned order has been passed viz. framing the issue and directing the defendants to enter into the witness box. Having regard to the totality of facts and circumstances, I am of the clear view that the petitioners are taken by surprise and did not have adequate notice as to what the trial court had in mind when it passed the order. Thus, the order is not sustainable in law as it results in breach of principle of natural justice and denial of

reasonable opportunity only on this ground, the impugned order deserves to be quashed and set aside. In the result, writ petition is partly allowed. The impugned order passed by the City Civil Court Greater Bombay dt.01.07.06 is quashed and set aside and the matter is remanded back to the trial court, with liberty to the respondents to move an appropriate application for framing of an additional issue and for seeking direction against the defendants for entering the witness box before leading of the evidence by the plaintiff. It is made clear that uninfluenced by this order, the trial court shall proceed to decide the application which the respondents propose to file before the trial court. Rule made absolute in above term with no order as to costs.

4. The learned counsel for the respondent pointed out that suit is of the year 1978 and hence, seeks direction from this Court for an expeditious disposal of this suit. Having regard to the fact that the suit is pending since the year 1978, I direct the trial court to decide the suit as expeditiously as possible and preferable within

6 months from today.

(SHRI A.P.DESHPANDE, J)